Department of Justice

TESTIMONY

OF

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ON

H.R. 169, H.R. 12039 "To amend the Privacy Act of 1974" bills

BEFORE

THE SUBCOMMITTEE ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

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Madam Chairwoman and Members of the Subcommittee:

We appreciate the opportunity to testify on H.R. 169 and H.R. 12039 and to discuss with you various legal issues and practical problems involving Department of Justice files. In addition to our views on the two bills you have specifically requested that we discuss the COINTELPRO notification program recently announced by the Attorney General, the relationship of the Privacy Act to the COINTELPRO files, lawsuits brought aginst the United States or individual officers because of COINTELPRO, and the intended resumption of the FBI's records destruction program under its Records Control Schedule.

In the interest of time we will discuss each of these matters as briefly as we can.

I.

Since H.R. 12039 encompasses the provisions of H.R. 169, we will confine our comments to the more recently introduced bill.

H.R. 12039 would amend the Privacy Act in several respects. It would revise 5 U.S.C. 552a (d)(2)(B)(ii) to specify that an individual may request not only the correction of records but expungement, updating or supplementation when the individual

believes the records are not "accurate, relevant, legally maintained, timely or complete." It would add new provisions requiring agencies to notify "persons" (as distinguished from "individuals") concerning unconsented interception or examination of communications or searches, and would require notice to persons who are the subjects of files compiled in the course of three programs - CHAOS, COINTELPRO, and the Internal Revenue Service "Special Service Staff" programs. Persons notified would have the option of "requiring" that agencies destroy the files. The bill would also eliminate the express authority of the CIA and Secret Service to exempt some of their records from certain provisions of the Privacy Act.

We have serious difficulties with the provisions of H.R. 12039 particularly in their intended relationship to existing law.

The amendment to the correction provision of the Privacy Act not only retains the uncertainity of existing law but increases it. The Privacy Act now authorizes individuals to seek correction of agency records which the individual believes are not "accurate, relevant, timely or complete" and it does so without exception or without definition of the operative terms. Literally it could be read to authorize requests to alter sworn statements, official transcripts or accurately recorded statements of third-party opinion and to

require that closed files of historic interest be reopened to add new material unrelated to the original subject matter. By revising the provision to refer not only to correction but also to expungement, updating or supplementation - without defining the intent of these concepts or the original language - the interpretive problems are exaserbated.

Is it intended, for example, that I be allowed to demand expungement of any unfavorable comments of third parties in my background investigation file or seek to "update" last year's performance rating by substituting this year's? Could an equal employment opportunity complainant "supplement" an affidavit filed earlier substantially altering its content? These questions have already arisen under the existing law and the bill does not resolve them.

As you know, we have taken the position that the correction provision of the Privacy Act encompasses the right to seek expungement in appropriate cases. Our primary concern is that neither the present Act nor its proposed amendment suggests what are - or are not - appropriate cases.

The notification provisions of H.R. 12039, in our view, sweep too broadly and conflict with existing law without addressing such conflicts. Moreover, they pose serious problems for effective law enforcement and the protection of

national security.

Proposed paragraph (e)(12)(A) would require notice to both sender and receiver of wire communications that have been intercepted without a warrant or without the consent of both parties to the communication. The requirement is inconsistent with provisions of 18 U.S.C. 2510 et seq. which exclude interception with one-party consent from the warrant provisions, permit emergency interception on a limited basis without warrant, and provide discretion to the court to alter the notification requirements related to interception. For example, the provision would appear to require notice to a kidnapper that his ransom demands on his victims had been taped with the victim's consent. Coupled with the destruction provision, the bill could even be read to authorize a defendant to "require" that the tapes be destroyed prior to his kidnapping trial. The Title 18 provisions on interception were designed to avoid such problems. H.R. 12039 would appear to amend Title 18 without any direct reference to it.

We might also note that the bill's sweeping provision on interception could be read to require the Federal Communications Commission to provide notice of radio monitoring under the Communications Act, 47 U.S.C. 605, yet it makes no

reference to that Act or its intended relationship to the proposed Privacy Act amendments.

The provision refers to the "examination" of various types of communications, including written communications, and requires notification whenever there is neither a warrant nor both-party consent. It is not clear whether this language is intended to encompass "mail covers" or customs examinations for contraband for which no warrant is legally required. The "examination" language also raises the question whether law enforcement authorities examining threatening or extortionate communications turned over by the intended victim would be required to notify the potential defendant and even destroy the evidence at his request.

The provision requires notice to the occupant, resident or owner of premises or vehicles searched without a warrant or without consent. It is not clear whether actual notice to any one of the three, present at the time of the search, is sufficient or whether separate notice to any or all of these is required. Many warrantless vehicle searches will involve occupied vehicles and the occupant will, therefore, already have actual notice of the search. Cf. Carroll v. United States, 267 U.S. 123 (1925). Similarly, warrantless searches contemporaneous with arrest, by their very nature, will involve actual notice to an occupant of the premises.

Cf. Chimel v. California, 395 U.S. 752 (1969). Is it contemplated that subsequent notice must be given as well? Must owners or residents, not present at the time of the search, be separately notified? The bill is unclear in this respect.

Even more serious than the law enforcement problems posed by the bill are the problems created in the counterintelligence field. Notice to foreign agents engaged in espionage that their identity or operations have been determined by means of interceptions would effectively paralyze the counterintelligence efforts of this country. The bill even goes so far as to substitute the word "person" for the word "individual," now used and defined in the Privacy Act, suggesting that notice would be required to be given to foreign nationals as well as U.S. citizens. It might even be read to authorize foreign nationals to "require" the destruction of the information obtained. As the Attorney General has made clear in his testimony on national security wiretap legislation, we are not opposed to judicial review of national security interceptions but we consider notice provisions, such as this, totally inconsistent with national security.

Finally, we note that proposed paragraph (12) would require agencies to advise persons of their rights under the

Freedom of Information Act and provide such persons with the option of "requiring" that agencies destroy the file. Aside from the problems already alluded to, this provision fails to address the relationship between its apparent destruction requirement and the record-keeping requirements of the Federal Records provisions, 44 U.S.C. 2103, 3301 or 18 U.S.C. 2518(8). Nor does it make exception for files which may be the subject of pending litigation. Certainly, files relating to litigation should not be destroyed until the case is resolved and we question whether individuals should have a personal right to override the historic records requirements or judicial supervision of electronic interception requirements of existing law. As recent experience indicates, such a destruction requirement may also be inconsistent with congressional interest in the preservation of certain files.

The notification provisions relating to specific programs, such as COINTELPRO, involve somewhat different considerations. We will confine our comments to COINTELPRO itself, deferring to the CIA and Internal Revenue Service with respect to the other programs.

As you are aware, we have no theoretical objection to the concept of notification of individuals who may have been

affected by COINTELPRO and we have already taken the position that the current Privacy Act permits individuals to request destruction of files which may not properly be maintained under the Privacy Act. Our concern is that the provisions of H.R. 12039 do not adequately address the complex issues raised by notification and destruction. Indeed, we seriously question whether the issues can be adequately addressed in legislation.

The term COINTELPRO, as we use it, refers to a program of particular tactics directed at individuals or organizations under investigation. The tactics used, proper or improper, are separate and apart from the question whether the investigations themselves were undertaken for valid law enforcement purposes. This distinction is important in determining the scope of notice to be given, the degree of information to be provided, and the extent to which information may be subject to destruction under the Privacy Act.

It is also important to make the distinction between destruction of records and the Privacy Act's prohibitions on agency maintenance of records. H.R. 12039 appears to

authorize destruction, at individual request, regardless of the nature of the records involved. As we read the Privacy Act, it prohibits agency maintenance of certain records but permits the Archives to maintain those portions of the records it finds to be of historic significance. 5 U.S.C. 552a(l). Our experience indicates that the Archives is primarily interested in preserving the historic fact of agency action, proper or improper, but is willing to permit destruction of personal data acquired in the course of agency action.

Notification and possible destruction of information relating to programs such as COINTELPRO, in our judgment, requires these fine distinctions as well as consideration of such matters as the preservation of documents relating to litigation. Likewise we have had in recent years the added consideration of congressional requests for the preservation of such documents. All of these complexities suggest the need for case-by-case review of issues such as notification and destruction rather than a sweeping legislative approach. We suggest that our announced COINTELPRO notification program offers a better approach

than H.R. 12039.

II.

Before discussing our COINTELPRO notification program, a brief background may be helpful.

The several programs carried out by the FBI and described by the term COINTELPRO were the subject of successful Freedom of Information Act requests, by journalists and individuals affected by COINTELPRO, prior to Attorney General Saxbe's public description of the programs. After the Department's release of its report on COINTELPRO additional FOI requests for this material were received. Approximately 60 to 70 such requests have been or are being processed and others may be included within the FOI backlog of 6,000 requests.

To the best of our knowledge there has not been a class action suit filed on behalf of all those who may have been the victims of COINTELPRO activities. However, the complaints in a number of pending suits against the government were amended so as to include allegations of harm from specific actions which may be related to COINTELPRO. Muhammad Kenyatta, et al. v. Clarence M. Kelley, Civ. No. 71-2595 (E.D. Pa.); Emily Harris, et al. v. Charles W. Bates, et al., Civ. No. CV-760034-ALS (C.D. Cal.); Peter Bohmer, et al. v. Richard M. Nixon, et al., Civ. No. 75-4-T (S.D. Cal.);

Institute for Policy Studies, et al. v. John N. Mitchell, et al., Civ. No. 74-316 (U.S.D.C. D.C.); Abdeen M. Jabara v. L. Patrick Gray, III, et al., Civ. No. 39065 (E.D. Mich.); Socialist Workers Party, et al. v. Attorney General, et al., 73 Civ. 3160 (S.D.N.Y.); American Civil Liberties Union, et al. v. City of Chicago, et al., No. 75 C 3295; Richard Dhoruba Moore v. Edward Levi, et al., Civ. No. 75-C-6203 (S.D.N.Y.); Jane Fonda v. L. Patrick Gray, et al., Civ. No. 73-2442-MML; Charles Koen v. Estate of J. Edgar Hoover, et al., No. 75-2076 (D. D.C.).

The revelations concerning COINTELPRO raised serious questions concerning what obligation the Justice Department might have to individuals injured by COINTELPRO activities. It is apparent that some of these activities may have been improper or illegal. A number of them may have resulted in injuries to individuals, including possible economic damage or harm to personal reputations. However, due to the covert nature of these activities, many of those affected by arguably improper actions might still be unaware that such actions were taken and are thereby unable to seek whatever remedy might be appropriate.

After a number of preliminary discussions, the Attorney General asked Rex E. Lee, Assistant Attorney General, Civil

Division, to prepare a recommendation with respect to an appropriate Justice Department response to this problem. Early in this year, Mr. Lee recommended that the Justice Department initiate a notification program with respect to individuals who were the subjects of arguably improper COINTELPRO activities. After further discussions and review of the scope and nature of the problem, the Attorney General announced on April 1 that he had established a special review committee to notify individuals who may have been personally harmed by improper COINTELPRO activities, that they were the subjects of such activities, and to advise them that they may seek further information from the Department as they wish.

The process of reviewing COINTELPTO files in preparation of notification is already under way. Actual notification can be expected to begin within 60 days. The notification process will hopefully be completed within three months. Notification will be made in all those instances where the following criteria are met: (1) the specific COINTELPRO activity was improper, (2) actual harm may have occurred, and (3) the subjects are not already aware that they were the targets of COINTELPRO activities. A special concern of the notification committee is that no rights to privacy be

infringed by the notification process and specific procedures to implement this concern are still being developed. Those notified pursuant to this program will be directed to contact a special office established to process any requests for further information on a priority basis. Notification decisions under these criteria will be made by the special review committee which has been set up under the Office of Professional Responsibility with the assistance, where required, of a special advisory committee made up of two Assistant Attorney Generals and the Legal Counsel of the FBI.

III.

The final subject we have been asked to discuss is the resumption of the FBI's records disposal program. As you are aware, the Senate leadership and the Senate Select Committee have advised the Attorney General that they have no objection to the resumption of this program.

The records disposal program to be resumed involves only those records approved for destruction by the National Archives and Records Service under the established Records Control Schedule. These include certain administrative records and identification records no longer needed; records

of criminal cases in which there has been no prosecution authorized, no investigation because of a lack of federal jurisdiction or an unsubstantiated allegation, or property cases in which no suspect has been identified; original records of criminal cases which have been closed for ten years, which have been microfilmed; and records of field office criminal cases which have been closed and of which summaries are maintained at Headquarters.

In an abundance of caution, FBI Headquarters halted all files destruction in response to the request of the Senate leadership in January 1975. While the standard microfilming process continued on closed files relating to criminal cases involving stolen motor vehicles, interstate transportation of stolen property and similar property matters, the originals of the documents were preserved as well. There are presently 2400 files drawers full of these original files being preserved even though the cases have been closed for 10 years. Similarly, the FBI is currently retaining 105 six-draw file cabinets full of criminal matters involving unsubstantiated charges or allegations outside federal jurisdiction, all over ten years old. Innumerable administrative

files relating to time and attendance records, auto accident reports, personnel transfers, travel requisitions, applicant files, tour arrangements, etc. are being maintained long beyond their normal destruction period. It is of these files which we propose to resume normal destruction in order to alleviate the space and manpower burdens of retaining them.

Under the Archives Records Control Schedule, files relating to domestic security, racial matters, extremist matters, counterintelligence and foreign intelligence are to be maintained indefinitely. The Control Schedule is, of course, binding on the Department and there is no intent to undertake routine destruction of such files. Even with respect to the criminal files subject to destruction under the Control Schedule microfilm copies would remain available indefinitely. The resumption of the destruction program would merely serve to reduce the storage burdens of a large volume of original and duplicate records, it would not eliminate any records of FBI activity which may be of interest to historians, the courts, the Congress or the public generally.

IV.

We hope, Madam Chairwoman, that we have addressed, at least in summary fashion, the subjects listed in your April 2 letter concerning these hearings. We will be happy to respond

to any questions the Subcommittee may have.